



February 2, 2001

Mr. Jeffrey L. Schrader
Assistant Criminal District Attorney
Bexar County Justice Center
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2001-0406

Dear Mr. Schrader:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 143874.

The Bexar County District Attorney's Office (the "district attorney") received a request for "the closed file" in a specified case. You claim that the requested information is excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

Initially, we note that the submitted information includes records relating to grand jury proceedings. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to the Public Information Act, so that records within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See* ORD 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that any of the submitted information relating to grand jury proceedings is in the custody of the district attorney as agent of the grand jury, such information is in the constructive possession of the grand jury and therefore is not subject to disclosure under chapter 552 of the Government Code.

¹This letter ruling assumes that the representative sample of information you submitted is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the district attorney to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We also note that some of the submitted information is subject to required public disclosure under section 552.022(a) of the Government Code. Section 552.022(a) provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17) (emphasis added). Sections 552.103, 552.108, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. See Gov't Code § 552.007(a); Open Records Decision Nos. 665 at 2 n.5 (2000), 522 at 4 (1989). As such, these exceptions do not constitute "other law," under section 552.022(a), that makes information expressly confidential. You have not raised, and this office is not aware of, any other law under which information that also is contained in public court records is confidential. Accordingly, the district attorney must release responsive information that also is contained in public court records. We have marked the type of information that you must release under section 552.022(a)(17).

Section 552.111 of the Government Code excepts from required public disclosure "[a]n interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." You contend that the requested information is protected by the attorney work-product privilege, as encompassed by section 552.111. In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold information under section 552.111 if the governmental body is able to show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993) and (2) that the information in question consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 at 5 (1996). The attorney work-product doctrine is applicable to litigation files in criminal as well as civil litigation. See *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)). In *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380.

In this instance, the requestor seeks "the closed file" in a specified case. You indicate that the responsive information consists of the felony prosecution file in that case and related records that also are maintained by the district attorney. Based on your representations and

our review of the submitted information, we conclude that the information in question represents the district attorney's attorney work-product. Thus, except for the information that is subject to required public disclosure under section 552.022(a)(17), the district attorney may withhold the requested information from disclosure under section 552.111. As we are able to make this determination, we do not address your arguments under sections 552.103 and 552.108.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

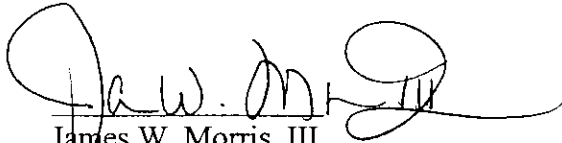
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 143874

Encl: Submitted documents

cc: Mr. Laurence S. Kurth
Jones Kurth & Andrews
10100 Reunion Place, Suite 600
San Antonio, Texas 78216
(w/o enclosures)